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No. 84-237

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*,
Appellants,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

Consolidated With Nos. 84-238, 84-239

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The interests of the USCC include the areas of education, social welfare, health and hospitals, family life, immigration, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching issues pertinent to its activities, particularly when they affect the organizations and people of the Catholic Church in the United States.

Over the past nineteen years, pursuant to Chapter 1 of the Education Consolidation and Improvement Act and its predecessor, Title I of the Elementary and Secondary Education Act,[1] the New York City Board of Education has provided remedial education to economically and educationally deprived children in both public and private schools, including religiously affiliated schools. With respect to the latter, after comprehensive study and experimentation with other formats, the City of New York concluded that an on-premises program of remedial instruction maximizes the educational benefits made available by Congress. The United States Court of Appeals for the Second Circuit has held that this on-premises program violates the Establishment Clause of the First Amendment,[2] thereby frustrating the will of Congress and its implementation by New York City. A reversal of that decision would enable school districts to decide how best to implement Congress' goal of quality education for all children without regard to the public or private character of their schools.

Through their counsel, all parties consent to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

The Court's most recent decisions have contributed new cogency to Establishment Clause analysis through

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[1] On July 1, 1982, the Elementary and Secondary Education Act (ESEA) of 1965 was amended and superseded by the Education Consolidation and Improvement Act (ECIA) of 1981. Pub. L. No. 97-35, 95 Stat. 464, Title V, Subtitle D (1981). Chapter 1 of the ECIA incorporated by reference most provisions of Title I of the ESEA which were the subject of this lawsuit when filed in 1978 and includes identical provisions governing participation of private school students. *See* 20 U.S.C. § 3803 (1982). Although the ESEA was amended and superseded by the ECIA during the pendency of this action, the parties and the court of appeals have referred to the program as "Title I." This *amicus* will do likewise.

[2] U.S. Constitution Amendment 1 provides in pertinent part that "Congress shall make no law respecting an establishment of religion . . ."

an appropriate and essential emphasis on the authentic purposes of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." [3] *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1359 (1984). *See Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3069 (1983).

In service to the Court, in *Mueller v. Allen, supra*, this *amicus* examined the precise generative and legislative history of the Establishment Clause, as well as the "primary effect" component of the three-part test in light of this history. In *School District of Grand Rapids v. Ball*,[4] this *amicus* has applied its analysis in *Mueller* with particular emphasis on the "secular purpose" criterion as the analytical vehicle for giving due recognition to government's responsibility to forge and implement policy for the public welfare, unimpeded by vague and conjectural constitutional objections. It also suggested an analytical identity between the "primary effect" and "excessive entanglement" criteria. Here this *amicus* focuses more particularly on the meaning of "excessive entangelement", and its analytical identity with "primary effect", as but an alternate means to judge whether state action impermissibly advances or inhibits religion.

The Establishment Clause was intended to prevent the new federal government from prescribing, approving or interfering in religious belief, practice, or governance. The Establishment Clause and the Free Exercise Clause

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[3] Chief Justice Burger in his separate opinion in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 802 (1973) indicated that "experience and history" rather than "logic" form the premise for this Court's treatment of Establishment Clause issues. This theme is reinforced by this Court's opinion in *Lynch v. Donnelly*, reemphasizing the importance of history in constitutional analysis. —— U.S. ——, 104 S.Ct. 1355, 1359 (1984).

[4] School District of Grand Rapids v. Ball, *cert. granted*, 104 S.Ct. 1412 (1984) (No. 83-990).

were united to achieve those ends. However, "hermetic separation" of church and state was not required. *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976). Church and state have served and continue to serve many important public interests in common, including education, and their involvement with each other to this day are many and varied. To distinguish valid from invalid involvements, this Court has developed the well-known three-part test of purpose, effect and entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) [hereinafter *Lemon*].[5]

The reliance of the court below on "excessive entanglement" calls for a critical reassessment of that branch of the three-part test. That phrase connotes only particular kinds of church-state involvement which are "fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620. In light of the authentic objectives of the Establishment Clause, entanglement becomes excessive, hence invalid, when the state becomes involved in matters of religious belief, practice, or governance. When that occurs, the state is in a position to sponsor or interfere with religion. *See Roemer v. Board of Public Works*, 426 U.S. at 747-48. Such state actions raise the spectre of establishment as that term was understood by the Framers, with consequent potential burdens on individual liberty. In the absence of such involvement, there is no state activity that may properly be considered as "excessive entanglement" in a proper constitutional sense. Unless "excessive entanglement" is firmly grounded in authentic constitutional values, it can cause the invalidation of important government programs despite the absence of genuine mischief.

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[5] As stated in *Lemon* v. *Kurtzman* [hereinafter *Lemon*], the three part test is: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster *excessive government entanglement with religion.* 403 U.S. 602, 612-13 (1971) [emphasis added].

There is an intimate connection between "primary effect" and "excessive entanglement". This Court in *Roemer* came very close to making the connection outright when it referred to "primary effect" and "excessive entanglement" as, respectively, the "substantive" and "procedural" sides of the same effects analysis. *See* 426 U.S. at 755-63. Under either criterion, the court must evaluate whether the state action "sponsors" (advances) or "excessively interferes with" (inhibits) religion. *Id.* at 747-48. Both are directed at the same ills, namely establishment with its inherent threat to religious liberty. Further clarification of this Court's evaluative criteria could simplify the analytical process and avoid results, like that on review here, whereby important legislative programs are stricken without basis in authentic constitutional values.

In words especially suited to this case, Chief Justice Marshall counselled: "But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability [sic] with each other." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). Acts of the Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871). In its more recent Establishment Clause decisions, the Court has stressed that a declaration of unconstitutionality should occur only when, by realistic measure, the state is clearly and directly involved in religion. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1361. "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330, 3337 (1983). "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitu-

tion. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531.

These principles rest upon important constitutional and policy grounds. The constitutional authority to resolve public debates over which actions should be undertaken to promote the public welfare is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). The Congress' resolution of the public interest should never lightly be set aside, especially when there is room for legitimate disagreement in setting the course of public policy. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557-58 (1978); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261-62 (1964).

The court below annulled Congress' judgments and the City's carefully considered implementation of Title I, and dismantled a remedial educational program which the court conceded "has done so much good and little, if any, detectable harm." *Felton v. Bell*, 739 F.2d 48 (2d Cir. 1984), S.G. App. 52a.[6] It did so because it perceived "excessive entanglement" in one minor aspect of the program whereby public school supervisors review the classroom work of Title I teachers. S.G. App. 35a-36a, 38a-39a. That supervision, among other things, is for the professional evaluation and development of the teacher. Because it also serves to assure that Title I courses are not used to advance religious views of the host school, the court said "this very surveillance constitutes excessive entanglement, even if it has succeeded in preventing the fostering of religion." *Id.* at 39a. It also suggested that even if the supervision were not "excessive entanglement", it was insufficient to assure with *certainty* that there would be no fostering of religion by Title I teachers. *Id.* Completing the conundrum,

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[6] The opinion below is reproduced in the Solicitor General's Appendix. *See* note 29, *infra*.

the court stated further that to achieve that level of certainty would create "excessive entanglement". *Id.*

There is no evidence in this case of actual or probable state involvement in religious belief, practice, or governance, the effect of which would threaten establishment or preference of religion, or religious liberty. The court's finding of "excessive entanglement" on this record is sheer conjecture which lacks even a trace of identifiable evidentiary support. Its determination can be explained solely by the religious nature of the schools involved. That result cannot be reconciled with the mutuality of objective of the Establishment Clause and the Free Exercise Clause. The decision below should be reversed.

ARGUMENT

I

THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PREVENT THOSE ENTANGLEMENTS BETWEEN CHURCH AND STATE WHICH CLEARLY AND DIRECTLY INVOLVE RELIGIOUS BELIEF, PRACTICE OR GOVERNANCE.

The Court's most recent decisions have contributed new cogency to Establishment Clause analysis through an appropriate and essential emphasis on the authentic purposes of the Establishment Clause, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S. Ct. at 1359. *See Mueller v. Allen*, 103 S.Ct. at 3069.

In service to the Court, in *Mueller v. Allen*, *supra*, this *amicus* examined at length the precise generative and legislative history of the Estabishment Clause as well as the "primary effect" component of the three-part test in light of this history. In *School District of Grand Rapids v. Ball*, *supra*, this *amicus* has applied the historical analysis of its *Mueller* brief, with particular emphasis on the "secular purpose" criterion as the analytical vehicle for giving due recognition to government's authority to forge and implement policy for the public welfare, unimpeded by vague and conjectural con-

stitutional objections, and suggested an analytical identity between the "primary effect" and "excessive entanglement" criteria. Here this *amicus* builds on its earlier analyses and focuses more particularly on the meaning of "excessive entanglement" and its analytical identity with "primary effect", as but an alternate means to judge whether state action impermissibly advances or inhibits religion.

A. A Program Authorized by Congress and Implemented by State and Local Governments Is Not Unconstitutional Under the Establishment Clause, Unless It Is Clearly Incompatible With the Clause.

In words especially suited to this case, Chief Justice John Marshall counselled:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability [sic] with each other.

Fletcher v. Peck, 10 U.S. at 128. The enduring wisdom of this admonition unites the principles of federalism, separation of powers, and judicial restraint. It fortifies the jurisprudential core for the three-part test. It reinforces the Court's renewed insistence that public acts for the common good shall be upheld save in those rare cases when government has so clearly and directly trenched upon the Establishment Clause that the Court is obliged by constitutional duty to defeat its legitimate social objectives.

Although Chief Justice Marshall wrote in regard to a state constitution, this Court long ago approved his caution and held that acts of Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. In its more recent Establishment Clause decisions, the Court has stressed that a declaration of unconstitutionality should not be predicated on mere possibilities, but only when, by realistic measure, the state is directly and substantially involved in religion. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality). *See also Lynch v. Donnelly*, 104 S.Ct. at 1361; *School District of Abington Township v. Schempp*, 374 U.S. 203, at 308 (1963) (Goldberg, J., concurring). "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, *supra*, *quoting*, *Abington Township v. Schempp*, *supra*. "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531. *See generally Hunt v. McNair*, 413 U.S. 734, 736 n.8 (1973).

These principles rest upon important constitutional and policy grounds. The constitutional authority to resolve public debates over which actions should be undertaken to promote the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. at 421-21, 423. The Congress' resolution of the public interest should never lightly be set aside, especially when there is room for legitimate disagreement in setting the course of public policy. *E.g.*, *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council*, 435 U.S. at 557-58 (nuclear power development); *Heart of Atlanta Motel v. United States*, 479 U.S. at 261-62 (civil rights enforcement). The Congress must decide the wisdom of a particular approach. Appropriate judicial

restraint serves the doctrine of separation of powers, a vital constitutional value which should be made to yield only in the clearest case of a supervening constitutional mandate.

B. The Establishment Clause Reflects the Precise Intent and Judgment of the Framers, Based on History and Experience, That There Should Be No Governmentally Preferred Church and That the Government Should Not Become Involved in Religious Belief, Practice or Governance.

The lamentable European and colonial experience with the entanglement of church and state, and the resulting loss of religious liberty, was a dominant influence on the Framers of the First Amendment. *See Engel v. Vitale*, 370 U.S. 421, 425-429, 432-33 and n.16 (1962); *Torasco v. Watkins*, 367 U.S. 488, 490 (1967).[7] The Religion Clauses were designed to protect religious liberty by guaranteeing that no religion could gain the special favor of the government, and by assuring equality and not mere tolerance of the various religious groups. Equality also required the state to avoid engagement in the religious functions of churches, and to that extent be separated from them.[8]

The meaning and precise objectives of the Establishment Clause clearly emerge when its terms are considered in light of history, in particular the legislative drafting process. The prohibition of an establishment or preference of one or more religions by the new federal government was the precise concern of four of the five

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[7] L. Whipple, *Our Ancient Liberties*, 66-68 (DeCapo ed. 1972). Colonial intolerance was compounded by royal action from time to time as religious fortunes changed in the mother country. James II, for example, denied freedom of worship and closed or diverted colonial churches by Royal decree. B. Long, *Genesis of the Constitution of the United States* 106 (1926).

[8] Whipple, *supra* note 7, at 72. *See also* Report of the Senate Judiciary Committee, S.Rep. No. 376, 32d Cong., 1st Sess. 1-2 (1853).

States which requested such an amendment when they ratified the Constitution.[9] That was the precise objective stated and restated by Madison as sponsor in the House.[10] There was no tension or doubt related to these objectives, but the choice of words to achieve them did engender certain anxieties born of other concerns.

Reference to "national" religion contained in an earlier draft of the clause (*see infra* note 13) evoked fears of an implication that the new government would be "national" and not "federal."[11] More important for present purposes was the concern that through the Religion Clauses the new government might interfere with the autonomy of the states in religious matters, particularly states which countenanced preferred religion to one degree or another.[12] The Religion Clauses that emerged from this

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[9] During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many including Madison believed that religion was not the province of the new government and that further clarification was not needed. III *id.* 330. The religious diversity of the new country made preference politically untenable, argued Madison. *Id. See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

[10] 1 *Annals, supra* note 9, at 432-34, 730-31.

[11] Comments during debtes, *id.* at 731. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause. *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Probs. 3, 10 (1949); M. Malbin, *Religion and Politics-The Intention of the Authors of the First Amendment*, 7 (1978); J. Story, *Commentaries on the Constitution of the United States*, 731 (1833).

[12] Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another.

process were a House-Senate compromise.[13] The language finally selected satisfied the major objectives of the recommending states as noted by Madison, but respected the other concerns of his peers.

The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Con-

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HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8	September 3
The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18 No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
Livermore's Language—August 15 Congress shall make no laws touching religion, or infringing the rights of conscience.	Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Ames Language—August 20 Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Final Text—August 24 Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	Final Text—September 9 Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .

COMPROMISE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

gress from interfering with a state's policies with regard to religion.[14] The phrase "respecting an establishment" cannot reasonably be read to mean merely concerning or touching upon religion. Indeed, that was the terminology of a proposal by Mr. Livermore which was eventually rejected by the House.[15] The word "establish" was *consistently* used to refer to federally preferred religion in the amendments recommended by the states, by Madison in the House debates, and in versions of the measure in both House and Senate.

There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to alter the meaning of "an establishment of religion." The language of the Clause does not concern itself with religion in general, but with the particular problem of an establishment of religion. There was no concern expressed during the House debates that Congress might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress*, 730-31 (Gales & Seaton eds. 1789).[16] Had this been the concern, it could

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[14] 1 *Annals*, *supra* note 9, at 730-31; *see* Corwin, *supra* note 11, at 11. "Respecting an establishment" meant more than the act of preference but a restraint on Congress' control over practices and beliefs. I A. Stokes, *Church and State in the United States*, 539-40 (1950). Simply put, the "national government was not to play the part of a theologian." W. Dunn, *What Happened to Religious Education?* 47 (1958). As noted Congress was prohibited from passing laws affecting state establishments. *Malbin*, *supra* note 11, at 16.

[15] Note 13, *supra*. Although Livermore's proposal passed on August 15, 1789 without any recorded debate, it was not the language eventually adopted by the House. 1 *Annals*, *supra* note 9, at 731, 765, 778.

[16] As much as the Framers were "utterly opposed to any constraint upon the rights of conscience," they "had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . . [T]hey did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy." S. Rep. No. 376, *supra*

have been dealt with simply by providing that "Congress shall make no law respecting religion", without introducing the more limited concept of "an establishment of religion." [17]

As noted, the drafting process reflected the Framers' experience with the historical realities of church-state entanglement. About half a century later, the Senate Judiciary Committee also reflected that experience when it rejected a citizens' petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion". In its Report in 1853, the Committee explained that "establishment of religion . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> The connexion [sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. This description strikingly parallels that found in recent deci-

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note 8, at 4. *See Zorach* v. *Clausen*, 343 U.S. 306, 312 (1952). Similarly, in *Marsh* v. *Chambers*, this Court reviewed actions of the First Congress which were beneficial to religion. —— U.S. ——, 103 S.Ct. 3330, 3333 (Chaplains), 3334 n.9 (Thanksgiving Holiday) (1983). *See also* Northwest Ordinance, Art. III, Ch. VIII, 1789 Stat. 50, 53; C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment*, 126 (1963).

[17] It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons discussed in text, *supra*.

sions such as *Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring) and *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982).

C. "Excessive Entanglement" Must Draw Its Meaning From History and Experience. It Exists When Government Is Involved in Religious Belief, Practice, or Governance. When It Is Not So Rooted, It Can Lead To The Invalidation of Government Programs Which Do Not Threaten Authentic Constitutional Values.

Because of the numerous mutual interests and resultant contacts between churches and the state,[18] hermetic separation has never been and could never be required by the Court. *Roemer v. Board of Public Works*, 426 U.S. at 745-46; *Abington Township v. Schempp*, 374 U.S. at 294-296 (Brennan, J., concurring). As this Court said in *Lynch v. Donnelly*, "[t]he concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." 104 S.Ct. at 1359. In measuring conformity to the mandate of the Establishment Clause, this Court has required a determination whether challenged action results in "excessive government entanglement with religion." *Walz v. Tax Commission of New York*, 397 U.S. 664, 674 (1970). The test, the Court said, is "inescapably one of degree". *Id.* However, accommodation of activities of churches, especially in education, has been a reality since colonial times without serious threat

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[18] Church and state share common interests in education, hospitals, child welfare, matrimony, public welfare and other areas too numerous to mention. Wherever church and state share an interest, involvement of one with the other is likely to follow. When churches engage in activities affecting the common good of the community, some state oversight to promote and protect the public interest is expected and, where reasonable, valid. But clearly churches exist to advance religious practices and beliefs; in thse matters the state rarely, if ever, has a valid interest. *See Lynch* v. *Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring).

of "excessive entanglement" in an authentic constitutional sense.

Churches provided the vast bulk of education through the first quarter of the Nineteenth Century. *Abington Township v. Schempp*, 374 U.S. at 238, n.7 (Brennan, J., concurring).[19] Even when public secular schools began to flourish, most of the education was still performed by clergy. *Id.*, *citing*, A. de'Tocqueville, *Democracy in America* 309, n.4 (1831).[20] The evolution of secular education in the Nineteenth Century did not occur because of the Establishment Clause or similar considerations.[21] As public schools began to share the educational burden with church schools, there remained, and still remain, many state involvements with church-related education without any violation of the First Amendment. *Board of Education v. Allen*, 392 U.S. 236, 245-46 (1968).

The state has an indisputable interest in education. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). It appropriately assures itself that all schools, including

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[19] In New England, where church-state connections were strongest, town churches operated the schools. In the more religiously diversified middle atlantic colonies, the various sects each ran their own schools. In the agrarian south, the wealthy were tutored at home; the less fortunate were educated at Anglican charity schools. W. Bower, *Church and State in Education*, 23-24 (1944). *See* W. Dunn, *supra* note 14, 14-17.

[20] The funds for these schools came from taxes, sales of public lands, private donations, and tuition. R. McCarthy, *et. al.*, *Disestablishment a Second Time*, 53-54 (1982). *See* Dunn, *supra* note 14, at 68-69 (discussing *e.g.*, New York).

[21] It was generated by political and cultural conditions: the rapid expansion of the country and its population, the increased ethnic and religious diversity, the enhanced civic education needs of a growing country, and secularization of the culture. Bower, *supra* note 19, at 25-28. Bower notes that the most significant factor was the increasing sectarianism in education which led to its displacement by state systems.

church-affiliated schools, adequately serve the public interest in education. In *Pierce v. Society of Sisters*, this Court recognized the states' authority:

> *reasonably* to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. 510, 534 (1925) [emphasis added]. *See Meyer v. Nebraska*, 262 U.S. 390 (1923). On the other hand, the state may not involve itself to such an extent that its action infringes fundamental constitutional rights, such as the parental prerogative in choosing a particular school, or religious practice or belief. *Pierce v. Society of Sisters, supra*; *Wisconsin v. Yoder, supra*.

The ultimate problem at which "excessive entanglement" is addressed is the nature of "the resulting *relationship* between the government and the religious authority." *Lemon*, 403 U.S. at 615 [emphasis added]. When a state aids church-affiliated schools, this Court has said that the mechanism to assure that the aid will not be diverted to promote a particular religious belief is a "relationship pregnant with involvement." *Walz*, 397 U.S. at 675. It *could* result in "sustained and detailed administrative relationships" having the effect of involving the state in matters of religious belief, practice, or governance. *Id.*; *see Lemon*, 403 U.S. at 621; *Meek v. Pittenger*, 421 U.S. 349, 369-70 (1975). On the other hand, churches "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works*, 426 U.S. at 746. In *Wolman v. Walter*, Justice Powell noted that the Court had never invalidated a program merely because it had a beneficial effect on religious-affiliated education, when "the aid is wholly secular in character and is supplied to the pupils

rather than the institutions." 433 U.S. 229, 262 (1977); *see id.* at 247, n.14.[22] State administration of a neutral secular program would not threaten "state inspection and evaluation of the religious content of a religious organization . . . fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620. *See Mueller v. Allen*, 103 S.Ct. at 3070, n.10; *Meek v. Pittenger*, 421 U.S. at 368, n.17. *See* note 22 *infra.*

The requirement of impermissible religious involvement suggests analogy to the cases which deal with the adjudication of church-related disputes. This Court has insisted that the First Amendment places ecclesiastical matters beyond the civil courts. *E.g., Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Civil authority may not decide religious doctrine, even in resolving what would otherwise be a secular dispute. *Serbian Eastern Orthodox Church v. Milivojevich*, 426 U.S. 696, 703 (1976); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). There is the "danger that the state will become *entangled* in essentially religious controversies in violation of the First Amendment." *Serbian Church, supra* [emphasis added]. Thus, this Court has approved a neutral legal principles approach to "free civil courts completely from *entanglement* in questions of religious doctrine, polity, and practice." *Jones v. Wolf*, 443 U.S. 595, 603 (1979) [emphasis added]. This rationale for judicial abstention provides a useful basis for a consistent adjudication of cases which

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[22] For this reason *Wolman v. Walter*, 433 U.S. 229 (1977) is seen as a turning away from some of the strict implications of *Meek v. Pittenger*, 421 U.S. 349 (1975). Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 Ohio St. L.J. 783, 789 (1977). Similarly, equal opportunity for aid that is secular in character and available to all children does not raise the same sort of constitutional issue as would aid expressly limited to religious schools or students. *Americans United v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.) (three judge court), *aff'd mem.* 434 U.S. 803 (1977).

deal with legislative and executive involvements in the educational and other activities of churches and other religious organizations.

The tendency toward control of religion is the key to identifying those entanglements at which Madison and others directed the Religion Clauses. They include government involvement, even at the threshold, with established or preferred religion which itself could threaten religious liberty. *See Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring). Properly applied, the "excessive entanglement" criterion can serve legitimate Establishment Clause values. Its aim should be the kinds of involvements which history and experience teach can lead to retrenchment of religious liberty. It should not be the gratuitous foes of educational programs which are untainted in fact by constitutional excess. Where church-state interaction or cooperation does not concretely present the threat that the state may promote or control religious belief, practice or governance, it cannot be deemed "excessive entanglement" in a proper constitutional sense. *See Walz*, 397 U.S. at 669. For such involvements to exceed constitutional bounds, this *amicus* suggests there must be

(a) actual government assertion of authority,

(b) over religious activity,

(c) which actually tends to establish or prefer religion, or adversely affect religious liberty.

A lesser or ambiguous standard, especially where church and state together serve important public interests, leads to the invalidation of programs which serve a legitimate public interest, despite the absence of proven excursions beyond authentic constitutional bounds.[23]

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[23] Examples of such instances include portions of *Meek v. Pittenger*, 421 U.S. at 365 (loan of maps, charts, and laboratory equipment) and *Wolman v. Walter*, 433 U.S. at 253-54 (field trips).

D. The Establishment Clause Was Intended to Buttress the Free Exercise Clause. Applications Which Burden Religious Liberty Are Necessarily Erroneous.

As part of the Bill of Rights, the Establishment Clause was intended to safeguard individual liberty.[24] The same is true under the Fourteenth Amendment which applies the Establishment Clause to the states. *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). As noted above, it reflects the experience of its Framers that officially preferred or established religion generates religious intolerance and infringes upon personal liberty. S. Rep. 376 (1853), *supra*, at 4; *Abington Township v. Schempp*, 374 U.S. at 203, 221-22; *Engel v. Vitale*, 370 U.S. at 429, 430-32; *Torasco v. Watkins*, *supra*. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1364.

The invalidation of governmental educational programs which do not tend toward an established or preferred religion can itself effectively burden religious freedom in violation of the Free Exercise Clause. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) (denial of tax exemption for engaging in certain speech penalizes free speech). The government may not constitutionally condition the availability of a benefit on whether the potential recipient makes or refrains from making a particular religious choice. *McDaniel v. Paty*, 435 U.S. 618, 626, 633 (1978)

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[24] In *Wisconsin v. Yoder*, this Court stated "the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." 406 U.S. 205, 214 (1972). Stokes suggests that the Establishment Clause is the more important of the Religion Clauses for the protection of personal liberty. I Stokes, *supra* note 14, at 539.

(plurality); *Sherbert v. Verner*, 374 U.S. at 406. *Cf. Speiser v. Randall, supra.* When the Establishment Clause is made to burden religious liberty in that fashion, despite the absence of a concrete threat to authentic Establishment Clause values, the effect is an unconstitutional burden on Free Exercise. *McDaniel v. Paty, supra.*

Under the First Amendment, government may not unduly influence or inhibit parents' freedom to choose between private and public schools. *Abington Township v. Schempp*, 374 U.S., at 242. (Brennan, J., concurring). When there is no clear incompatibility between the Establishment Clause and an educational program available to all, invalidation under the Clause impermissibly burdens parents' freedom to choose a religious school for their children by denying them the general public benefit. *Meek v. Pittenger*, 421 U.S. at 386-387 (Burger, C.J., dissenting). A declaration of unconstitutionality in those circumstances can be a disability on church-affiliated education solely because of the religious nature of the school. Such a result is fundamentally inconsistent with the First Amendment.

Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities conducted by religious institutions which serve the public interest and which pose no actual threat to religious freedom.

II

THE THREE-PART TEST SUGGESTS A TWO-PART PURPOSE AND-EFFECT ANALYSIS. "EXCESSIVE ENTANGLEMENT" PROVIDES A MEANS TO DISCERN WHETHER A PARTICULAR ACTION HAS A PRIMARY EFFECT THAT ADVANCES OR INHIBITS RELIGION.

In its brief in *School District of Grand Rapids*, this *amicus* discussed (at 4, 16-25) the practical function of the three-part test as a two-part purpose-and-effect analysis. The general principle of the cases is that legislative action does not violate the Establishment Clause if its "primary effect" neither advances nor inhibits religion. *Committee for Public Education, Etc. v. Regan*, 444 U.S. 646, 653 (1980). The proper job of the "primary effect" component in Establishment Clauses analysis is to identify those governmental actions which pose a realistic threat of an establishment of religion, with a consequent burden on religious liberty. So too, as discussed above, for "excessive entanglement" to be a useful and principled analytical device there must be actual involvement by the government in religious affairs which tends actually (1) to establish or prefer a religion, or (2) otherwise to burden the free exercise of religion. These objectives themselves do not suggest a separate substantive criterion, but one which is subsumed under an "effects" analysis that entails more than one avenue of review.

Until 1970, this Court addressed Establishment Clause issues only in terms of purpose and effect. *E.g., Abington Township v. Schempp*, 374 U.S. at 222. In *Walz*, this Court identified entanglement as a means of assuring that "the end result—the *effect*—is not an excessive government entanglement with religion." 397 U.S. at 674 [emphasis added]. Later, when a plurality examined the meaning of entanglement in *Roemer v. Board of Public Works*, it did so by examining virtually the same factors as for "primary effect". 426 U.S. at 755-63. It was stated that the difference between "excessive entangle-

ment" and "primary effect" lies in the fact that the former is essentially a procedural issue and the latter a substantive one. *Id.* at 755. Because both appear, however, to be opposite sides of the same "effects" coin, in his concurring opinion Justice White questioned whether "excessive entanglement" was a criterion truly distinct from "primary effect". *Id.* at 769. For all the reasons put forth earlier, this *amicus* respectfully suggests that important analytical difficulties in Establishment Clause cases would be mitigated by an acceptance of Justice White's insight.

Under the Establishment Clause, "[n]eutrality is what is required." *Id.* at 747. Under the "primary effect" component, courts examine whether the principal result of state action either advances or inhibits religion. *Mueller v. Allen*, 103 S.Ct. at 3066, 3067. The government's efforts to support actions undertaken by churches that advance the public interest "may not lead it into such an intimate relationship with religious authority that it appears *either to be sponsoring or excessively interfering with that authority.*" *Roemer*, 426 U.S. at 747-48 [emphasis added]. The "sponsoring" element (advancement) raises the prospect of establishment in an authentic constitutional sense. *See* Argument I, B, *supra.* The "excessively interfering" aspect (inhibition) raises both establishment and free exercise concerns depending upon the nature of state action. *See* Arguments I, C and I, D *supra.* Although the underscored language quoted above from *Roemer* describes the "effect" of state action, the presence of "excessive entanglement" in the analysis is unmistakable.

Some discussions of the "excessive entanglement" criterion do not make clear its relationship to "primary effect", *i.e.* to the requirement that it is the threat of government's impermissible involvement in religion that stigmatizes "comprehensive, discriminating, and continuing state surveillance". *Lemon*, 403 U.S. at 619. Terms like "surveillance" lack constitutional significance unless, as in *Roemer*, the focus is upon conduct which clearly

trenches upon authentic Establishment Clause values. Further refinement of the substantive function of "excessive entanglement" in relation to "primary effect" would provide clearer guidance not only for the courts, but for those who must make legislative and administrative judgments.[25]

This *amicus* respectfully suggests that "excessive entanglement" should be understood precisely as another measure of whether state action has the primary effect of unconstitutionally advancing or inhibiting religion. "Excessive entanglement" and "primary effect" are alternative means of identifying the same problems, *i.e.* state action which tends to establish religion or burden religious liberty.

III

THE DECISION BELOW DOES NOT ACCORD WITH THE DECISIONS OF THIS COURT, ESPECIALLY THOSE WHICH STRESS FIDELITY TO CONSTITUTIONAL VALUES AS ILLUMINATED BY HISTORY. THE "EXCESSIVE ENTANGLEMENT" CRITERION WAS MISUNDERSTOOD AND MISAPPLIED.

The Court of Appeals invalidated the Title I program in New York City because it decided, erroneously, that the program excessively entangled church and state. *Felton v. Bell*, 739 F.2d 48 (1984), at S.G. App. 37a-38a and 53a.[26] The decision was a product of both an unduly

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[25] It has been noted that the seemingly anomolous results under the three-part test create a practical dilemma for those who must shape and administer public policy. *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 J. Law & Educ. 101 (1974). What is a reviewable misunderstanding of constitutional principle in the judicial process can operate as an unwarranted restraint upon legislative and executive judgment, with protracted social effects.

[26] The reference "S.G. App." refers to the Appendix to the jurisdictional statement of the Solicitor General in No. 84-238, consolidated with Nos. 84-237 and 84-239. Appendix A is the decision below; Appendix C is the decision of a three judge court approving the program in 1980.

narrow view of this Court's rulings in *Meek v. Pittenger*, *supra*, *Wolman v. Walter*, *supra*, and two less germane cases,[27] and a failure to adjudicate the issues by a principled application of this Court's more recent decisions.[28] The court thought it was not "to make an independent interpretation of the constitutional text or to engage in creative distinctions but to do its best to follow what the [Supreme] Court has said." S.G. App. 15a. It thought its "task [was] to analyze the precedents and apply them as best we can: The responsibility for modifying or overruling them, if that is to be done, rests elsewhere." S.G. App. 43a, n.25. This *amicus* respectfully submits that due regard for the decisions of this Court would have led to a contrary result in the court below.

The Title I program is based on Congress' finding that there is "a close relationship between conditions of poverty and lack of educational development and poor academic performance." S. Rep. No. 146, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Admin. News 1446, 1450. By authorizing grants for remedial and supplementary education, Congress intended to help children who live in areas where there is a high concentration of poor and whose educational aptitude is below average for their age. 20 U.S.C. §§ 2722, 2732-34. Under Title I, school districts are required to provide publicly sponsored instruction on an equal basis to eligible children in both public and private schools. [1965] U.S. Code Cong., *supra*, at 1456, 1457. Congress contemplated that in some instances public school teachers would even provide special educational services (defined as "thera-

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[27] *Wheeler v. Barrera* did not reach the First amendment issue. 417 U.S. 402, 426 (1974). *Public Funds for Public Schools v. Marburger* is distinguishable on several grounds, including the fact that assistance was provided directly to non-public schools, not directly to the children. 358 F. Supp. 29 (D.N.J. 1973) (three judge court), *aff'd mem.*, 417 U.S. 961 (1974).

[28] *E.g.*, *Lynch v. Donnelly*, *supra*, *Mueller v. Allen*, *supra*, and *Marsh v. Chambers*, *supra*.

peutic, *remedial*, or welfare services") outside of public school facilities. *Id.* [emphasis added]. Because particular needs vary across the country, Congress also provided that each local school district should design a program that would best remedy its specific problem. *Id.* at 1454.

New York City designed its program to meet its particular needs for remedial and supplementary instruction. S.G. App. 10a-11a, and n.5. After experimenting with off-premises and after-hours programs, the City determined that on-premises instruction was necessary to maximize educational benefits and minimize costs. *Id.* at 7a-8a. The effectiveness of this approach was borne out by a study, conducted in the 1977-78 school year, which demonstrated (among other things) that if the format were reversed and instruction were provided in public schools, over 40% of the program budget would be expended on transportation and other non-instructional items. S.G. App. 8a-9a; S.G. App. C 72a. In order to fund an off-premises program, it would have been necessary to cut 36% of the private school children enrolled in the program. *Id.* at 73a.

All Title I program teachers are employed by the New York City Board of Education, and they are under its exclusive control. *Id.* at 74a.[29] Each teacher reports to a field supervisor who, in turn, reports to a field coordinator. A supervisor or coordinator, or both, attempt at least one on-premises visit per month to evaluate a teacher's professional performance; to discuss any problems, complaints or concerns that might have been raised by the teacher, the City or the schools; and to monitor compliance with program guidelines. Supervision also occurs in monthly in-service sessions when private schools are closed for a holiday. S.G. App. 12a-13a. Supervisors

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[29] On-premises instruction in private schools occurs in classrooms specifically reserved by the private schools for the purpose. S.G. App. 13a. The classrooms are designated by signs as Title I classrooms and have been purged of all religious symbols. S.G. App. C 74a.

are not involved in the affairs of the private school. They do have contacts of a routine, administrative nature, including the review of Title I guidelines with private school administrators prior to the school year. *Id.* at 13a-14a. Title I "creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." U.S. Office of Education Program Guide No. 44 (1968), *quoted below*, S.G. App. 14a.

The court below annulled Congress' judgments and the City's carefully considered implementation of Title I, and dismantled a remedial educational program which the court conceded "has done so much good and little, if any, detectable harm." S.G. App. 52a. It did so because it perceived "excessive entanglement" in one minor aspect of the program whereby public school supervisors review the classroom work of Title I teachers. *Id.* at 35a-36a, 38a-39a. That supervision, among other things, is for the professional evaluation and development of the teacher. Because it also serves to assure that Title I courses are not used to advance religious views of the host school, the court said "this very surveillance constitutes excessive entanglement, even if it has succeeded in preventing the fostering of religion." *Id.* at 39a. It also suggested that even if the supervision were not "excessive entanglement," it was insufficient to assure with *certainty* that there would be no fostering of religion by Title I teachers. *Id.* Completing the conundrum, the court also held that to achieve that level of certainty would create "excessive entanglement." *Id.*

There is no evidence in this case of actual or probable state involvement in religious belief, practice, or governance, the effect of which would threaten establishment or preference of religion, or religious liberty. Chief Justice Burger's remarks in *Meek* seem particularly apt here:

> there is absolutely no support in this record or for that matter, in ordinary human experience for the concern some see with respect to the "dangers" lurking in extending common, non-sectarian tools of the educational process—especially remedial tools—to students in private schools.

421 U.S. at 385 (dissenting opinion). The court's finding of "excessive entanglement" on this record is sheer conjecture which lacks even a trace of identifiable evidentiary support.

The Title I program does not begin to approach the threshold of unconstitutional entanglement. It neither advances nor inhibits religion, nor does it threaten to do so in any way. The Constitution demands more than a groundless fear that publicly employed professionals may be "captured" by the "sectarian environment." S.G. App. 31a n.13, 36a n.15.[30] It requires proof of action which threatens authentic constitutional values, not an impossible contra-burden of proof that there will never be a problem. *Compare Legal Tender Cases*, 79 U.S. at 531 *and Hunt v. McNair, supra, with* S.G. App. 38a. The decision below is a product of "vague conjecture" (*Fletcher v. Peck*, 10 U.S. at 128) which fails to make the mandatory distinction between "real threat and mere shadow" (*Marsh v. Chambers*, 103 S.Ct. at 3337).

On this record, the invalidation of the Title I program is explained solely by the religious nature of the schools involved. That result cannot be reconciled with the

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[30] Although there is some discussion in both *Roemer*, 426 U.S. at 754, and *Wolman*, 433 U.S. at 247, about actions of public employees in a sectarian environment, such a conclusion is, first, difficult to justify on the record here and, second, impossible to reconcile with the constitutional requirement of clear incompatibility. The analysis that this *amicus* suggests is more in line with this Court's conclusion in *Committee for Public Education, Etc. v. Regan*, that it would not surmise the inevitability of bad faith leading to future excesive entanglement where the plan under review disclosed none. 444 U.S. 646, 660-61 (1980).

mutuality of objectives of the Establishment Clause and the Free Exercise Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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